



UNITED STATES PATENT AND TRADEMARK OFFICE

Commissioner for Patents  
United States Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450  
[www.uspto.gov](http://www.uspto.gov)

D. EDWARD DOLGORUKOV  
MARSHALL AND MELHORN, LLC  
FOUR SEAGATE- 8TH FLOOR  
TOLEDO OH 43604

**COPY MAILED**

**SEP 15 2004**

**OFFICE OF PETITIONS**

In re Application of

Ott, Douglas, et. al.

Application No. 09/314,052

Filed: May 18, 1999

For: METHOD AND APPARATUS FOR  
CONDITIONING GAS FOR MEDICAL  
PROCEDURES

: Three  
: Week  
: Letter  
:  
:  
:

A petition for access under 37 CFR 1.14(a)(1) and (h) was filed by John C. Freeman on behalf of Northgate Technologies, Inc. for access to the above-identified application on February 20, 2004, without proof of service on applicants. A copy of the petition is enclosed with this letter.

A member of the public may be entitled to access if "special circumstances" are shown which warrant a grant of access under 35 U.S.C. § 122. See Manual of Patent Examining Procedure (MPEP), Section 103. The use of such application to interfere with the business of others may be such special circumstances. Ex parte Bonnie-B Co. Inc., 1923 C.D. 42; In re Application for Trimless Cabinets, 128 USPQ 95 (Comm'r Pats. 1960); and In re Crossman, Kenrick, and LeMieux, 187 USPQ 367 (PTO Sol. 1975).

Petitioner states that access should be granted to the above-identified application because of actions taken in petitioner's application no. 09/896,821. Petitioner also states that access should be granted due to interference in Northgate's business.

With respect to actions taken in the '821 application, a paper with a September 2, 2003 date was filed in the '821 application and identified as an Information Disclosure Statement (IDS) on the top of page 2. The signer identified himself in the signature block as "Carl L. Johnson" with Reg. No. 24,273 and as "Attorney for Applicant," which suggests that the IDS needed to comply with 37 CFR 1.97 and 1.98, not 37 CFR 1.99, and that Mr. Johnson was acting in a representative capacity on behalf of the patent applicant when the IDS was filed. See 37 CFR 1.34.

Had the papers filed on September 2, 2003 been reviewed for compliance with 37 CFR 1.99, the patent applications cited therein would not have been considered. Patent applications are neither patents nor publications, and, as a result, the citation of a patent application would not have been permitted pursuant to 37 CFR 1.99. Had the paper been properly identified as a submission under 37 CFR 1.99, it would not have been considered because the fee, copy, or service requirements of 37 CFR 1.99(b)(1), (3) or (c) were not met. The matters in the petition relating to this conduct and possible sanctions are being referred to the Office of Enrollment and Discipline for resolution and will not be further addressed in the petition decision.

In view of the petition, it is apparent Mr. Johnson does not represent the applicant of the '821 application. The petition on page 2, states that petitioner was informed that the September 2, 2003

communication was filed by Lexion's attorney. Lexion is the assignee of record of the above referenced application.

With respect to interference in Northgate's business the petition includes, as exhibits, correspondence with Lexion, the assignee of record of the above referenced application. The correspondence relates infringement of Lexion's patents which are stated by petitioner to be related to the above referenced application. While interference with business relations may be sufficient to warrant access, the filing of the Information Disclosure Statement is more material. By filing the IDS, Mr. Johnson appears to have given the applicant in which the IDS was filed a right to inspect the applications cited in the IDS.

The Office will not permit third parties to interfere in the prosecution of another party's application by filing a protest without the consent of the applicant of the other application. It appears from the petition however, that petitioner will consent to "IDS," filed September 2, 2003, if given access to applications cited therein (the above-identified application and another application). If petitioner is denied access to the above referenced application the Office will *sua sponte* expunge the paper filed by Carl Johnson from the record of the '821 application.


Applicants are hereby given THREE WEEKS from the date of this letter to file a response to this letter consenting to or opposing access. The response should also state who Carl Johnson represents and his relationship to the parties. If applicant fails to respond within the three week period, petitioner may be allowed access to the entire application.

Any correspondence with respect to this matter should be addressed as follows:

By mail:                      Mail Stop Petition  
                                    Commissioner for Patents  
                                    P.O. Box 1450  
                                    Alexandria, Virginia

By FAX:                      (703) 872-9306  
                                    Attn: Office Patent Legal Administration/Michael L. Lewis

Telephone inquiries should be directed to Michael L. Lewis at (703) 306-5585.

  
for/ Karin Ferriter, Senior Legal Advisor  
Office of Patent Legal Administration  
Office of the Deputy Commissioner  
for Patent Examination Policy

cc:     JOHN C. FREEMAN  
         BRINKS HOFER GILSON & LIONE  
         N B C TOWER, SUITE 3600  
         455 NORTH CITYFRONT PLAZA DR.  
         CHICAGO IL 60611

Attachment:    Petition filed February 20, 2004